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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2006

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THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

C.R.P.PD.NO.46 OF 2006
AND
C.M.P.NO.471 OF 2006

1.Palanichamy
2.Muthayammal .. Petitioners (Petitioners)

Vs.

1.Pommusamy
2.Rangasamy
3.Ponnusamy .. Respondents (Respondents)

This civil revision petition is preferred under Article 227 of the Constitution of India against the fair and decretal order, dated 25.7.2005 passed in IA No.817 of 2005 in OS No.634 of 2002 on the file of the learned Additional District Munsif Court, Namakkal.

For Petitioners : Mr.R.Subramanian

ORDER

The defendants are the revision petitioners. The plaintiffs filed a suit for partition claiming 1/4th share each to the total extent of 3/4th share and admitting that the first defendant is entitled for another 1/4th share.

2.All the three plaintiffs and the first defendant are brothers. Their father was one Rangama Naicker. The second defendant is the wife of one Muthu Naicker. The said Rangama Naicker, who is the father of the plaintiffs and the first defendant and Muthu Naicker were brothers and the property belonged to them as joint family property. The second defendant being the only legal heir of Muthu Naicker. It is the case of the plaintiffs that the said Muthu Naicker has executed a settlement deed, dated 26.2.1965 in respect of half share in the property, settling the same in favour of the plaintiffs and the first defendant. It is also stated that in turn, the plaintiffs and the first defendant have settled some of the property in favour of the said Muthu Naicker. It is also the case of the plaintiffs that the said Muthu Naicker has executed a Will on

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22.5.1994, by which, he has bequeathed all his properties to the plaintiffs and the first defendant. It was based on the said averments, the suit for partition was laid.

3.While trial was in progress, the plaintiffs filed I.A.No.817 of 2005 under Order 6 Rule 17 CPC for the purpose of amendment of the pleadings to the effect that the plaintiffs have given up their right under the Will executed by Muthu Naicker, dated 22.5.1994 and claiming share to an extent of 1/8 share for each of the plaintiffs based on the settlement deed executed on 26.2.1965. The amendment petition was filed on the basis that even though under the settlement deed and Will, each one of the plaintiffs are entitled to 1/4th share, since the first defendant has not acted in accordance with the settlement in maintaining the second defendant, who is in old age, being the wife of Muthu Naicker, the plaintiffs wanted to give up their right under the Will executed by Muthu Naicker on 22.5.1994. This was objected to by the first defendant on the ground that the Will stated to have been executed by Muthu Naicker on 22.5.1994 is a forged one and in fact, while the third plaintiff was cross examined as plaintiff witness, the same was elicited and thereafter, having realized the said fact, the present application for amendment is filed, giving up their right under the Will of Muthu Naicker, dated 22.5.1994. The first defendant has denied the fact that he has failed to maintain the second defendant. On the other hand, it is the case of the first defendant that in fact, the second defendant is living under the custody of the first defendant. Based on Ex.A.2, settlement deed of the year 1965 and Ex.A.4, the second defendant would submit that the filing of the suit itself is fraudulent. By way of bringing an amendment to the suit, the plaintiffs are attempting to claim right under item No.5, which was not at all forming part of the settlement deed. According to the first defendant, the application for amendment is only with an intention of committing fraud.

4.The learned trial Judge has allowed the said application for amendment on the basis that after examination of the plaintiffs witnesses, the plaintiffs have given up their right under the Will and therefore, the amendment is only a consequential. The further reason given by the trial court for allowing the amendment is that by such amendment, the defendants are not going to be affected. It is as against the amendment ordered by the trial court, the defendants have filed the present civil revision petition.

5.Even though notice has been served to the respondents in the civil revision petition, who are the plaintiffs in the suit, there is no appearance and in spite of the proof of service filed, there is no representation on behalf of the respondents.

6.Mr.R.Subramanian, learned counsel appearing for the revision petitioners would submit that the amendment ordered by the trial court, after examination of the witnesses, virtually amounts to give protection

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to the plaintiffs, who have made a claim based on the forged Will. In fact, if the claim of the first defendant that the Will stated to have been executed by Muthu Naicker on 22.5.1994 is a forged one, prepared at the behest of the plaintiffs, certainly it will affect the result in the suit itself.

7.On a careful consideration of the entire pleadings and the order passed by the learned trial Judge, even though I find some force in the arguments advanced by the learned counsel for the petitioners, I am of the considered view that in a suit for partition, if one of the parties gave up his right under any of the document, whether it is a forged document or not, that will not itself dis-entitle such party to have a share in the other properties, if they are otherwise eligible under any other document. Therefore, even assuming for argument sake, as it is stated by the first defendant in the counter affidavit before the trial court, that at the time of cross examination of the third plaintiff as a witness, it was elicited that the Will of Muthu Naicker, dated 22.5.1994 was proved to be a forged one and it is due to that reason to get over the difficulty of placing the forged document before the Court, I do not think that the plaintiffs can be shut from making claim in respect of the other properties, based on the other document, since it is a legal right, which has to be decided. In view of the same, I am of the considered view that there is nothing wrong in the trial court in allowing the amendment and after all, amendment can be allowed at any point of time to do substantial justice, which means to decide the issue in accordance with law, but that does not mean that by allowing the amendment, by which the plaintiffs are seeking to give up their rights under the Will, the trial court is dis-entitled from deciding the conduct of the parties in respect of the production of the Will, dated 22.5.1994.

8.In view of the same, I am of the considered view that the order passed by the trial court does not suffer from material irregularity or illegality and therefore, the civil revision petition has got to be dismissed. It is made clear that allowing the amendment does not mean that the Court can not look into the conduct of the parties based on the evidence adduced while discussing about the Will of Muthu Naicker, dated 22.5.1994. With the above observations, this civil revision petition is dismissed. The trial court is directed to complete the trial and pass final judgment within a period of four months from the date of receipt of copy of this order and report the same to this Court. Consequently, connected CMP is also dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Additional District Munsif,
Namakkal

2. The Sub Assistant Registrar,
Judicial Department,
High Court, Madras.
(for watching the report)

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RVL 05.12.2006

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